(ii) "Where the preparation of the case or matter for laying before a Judge at Chambers on a summons has required and received from the advocate and solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore appears to the Judge to deserve higher remuneration than the ordinary fees, the Judge may allow to the advocate and solicitor, by a memorandum in writing expressly made for that purpose, and signed by the Judge, specifying distinctly the grounds of such allowance, such fee not exceeding one hundred dollars as in his discretion he thinks fit, instead of the above-mentioned fees."

(59). "In all cases for which a fee or costs are not provided in this rule, or where from any exceptional feature the fees or costs allowed are not in the judgment of the Registrar sufficient, he may allow such fees or costs, or make such additions to the fees or costs of the existing scale, as the Judge on a reference to him directs."

Now it seems to me that sub-rule 49 (i) does not provide for this case because, in my opinion, all the provisions in that sub-rule are governed by the opening words thereof "As to attendances at Chambers". Thus, unless there was, in fact, an attendance in chambers, no addition can be made under (i) of sub-rule 49 to the fee provided for an attendance "on a summons at Judge's chambers" by item 193 in the Schedule.

I am also of opinion that (ii) of sub-rule 49 cannot apply to this case, as however extraordinary may have been the skill and labour devoted by the Defendants' solicitors to the preparation of their resistance to the Plaintiff's efforts to amend his plaint, it cannot be suggested that such skill and labour have conduced "to the satisfactory and speedy disposal of the business".

We come, then, to sub-rule 59, and I have arrived at the conclusion that I can and should make an addition, under this sub-rule, to the fees and costs allowed by the existing scale. The plaintiff's application to amend his plaint, in view of the plaint itself and the nature of those amendments, the time at which his application was filed, and the two attempts to obtain judgment by default which he made in the interim, did raise questions of unusual difficulty which necessitated an extensive consideration of the relevant authorities by the Defendants' solicitors. No fee for such consideration is provided for by Rule 4 of 1932, and the need for an extensive consideration of authorities is certainly an "exceptional feature" in the case of an application to the Judge in chambers.

I therefore direct the Assistant Registrar to allow each of the 3 solicitors, who appeared for the Defendants on the Plaintiff's application to amend his plaint, an additional fee of $100 for his work in considering the authorities and getting up the case.

[ORIGINAL CIVIL JURISDICTION]

ROGER HALL, C.J.

June 4, 1938.

OFFICIAL ADMINISTRATOR, F.M.S., as Administrator of the Estate of CHUA SWEE SIM NEO (f) DECEASED

(Plaintiff)

vs.

STATE OF SELANGOR AND 11 OTHERS

(Defendant).

(SELANGOR ORIGINATING SUMMONS No. 138 of 1937)

Chinese law and custom—Succession—failure of issue—adoption—absence of proof of legality of—bona vacantia.

C.S.S.N., one of the widows of L.B.T. deceased, was entitled to a pecuniary legacy under the will of her late husband. She had no children, but attempted to adopt two children, L.O.T. and L.T.L. She was said to have run away from her home and to have been seen in the street in Singapore. By a judgment in **Lee Seang Neoh v. Low Hin Tuan,** 5 F.M.S. Law Reports, it was presumed on the evidence there adduced that she attained the age of 40 years and so became entitled to be paid the legacy and it was also presumed that she died intestate in or prior to 1925. By the said judgment it was held that L.O.T. and L.T.L. had not been lawfully adopted. Letters of Administration to the estate of C.S.S.N. were granted to the Official Administrator, F.M.S., who was the plaintiff in this case. As a result of the publication of an advertisement for claimants, the State of Selangor and twelve individuals claimed to be entitled to share in the estate of C.S.S.N.

Held, that none of the claimants was entitled under the Chinese law and custom to take in the circumstances alluded to above, and that accordingly the legacy together with accumulations forming the estate of C.S.S.N. was **bona vacantia. (Yap Kon Keow and Another v. Low Hup Neo and Another** 6 F.M.S.L.R. 13 not followed.)

The domicile of the deceased being admittedly Chinese, the Court deferred making an award to the State of Selangor until the Chinese Government should have been heard on the matter, if it so desired.*

ORIGINATING SUMMONS.

Mackie, for the applicant.

Hay, Deputy Legal Adviser, for the State of Selangor Defendant No. 1.

Ramani for Defendants Nos. 2, 3, 4 and 5.

Briggs for Defendants Nos. 6, 7, 8, 9 and 10.

Sen for Defendant No. 12.

The 11th Defendant did not appear although duly served with the proceedings.

*This was brought to the notice of the Government of China which intimated that it did not desire to be heard in this particular case. In this connection **In re Barnett's Trust** (1902) 1 Ch. 847 and **In re Musurus** (1936) All E.R. 1666 are of interest.—(Ed. M.L.J.)

Cur. Ad. Vult.

Roger Hall, C. J. This Originating Summons was filed for the purpose of ascertaining who are entitled to the estate of Chua Swee Sim Neo (f) deceased, one of the wives of the late Low Boon Tit. Letters of Administration to the said estate were granted to the Official Administrator on the 12th day of July, 1937. Advertisements for claimants were duly published.

According to the affidavit of Mr. A. C. Jomaron, Official Administrator, affirmed on the 1st of November, 1937, the estate of Chua Swee Sim Neo consists of a legacy of $4,000 under the will of her late husband, and, after adding accrued interest and deducting expenses, the total sum to be administered is about $7,500.

The facts relating to Chua Swee Sim Neo are set out in the judgment of Sproule Ag. C. J. C. in *Lee Seang Neoh v. Low Hin Tuan,* 5 F.M.S. Law Reports, at pages 161—165. She married Low Boon Tit as a secondary wife about 1900, had no children, but attempted to adopt two children Low Oon Tong and Low Tee Lam, ran away with a Chinese doctor, and was last seen in the Street in Singapore about 1918. By the judgment cited *supra,* it was presumed that she lived to attain the age of 40, and so became entitled to be paid the legacy, and it was also presumed that she died intestate in or prior to 1925. By the aforesaid judgment it was also held that the said Low Oon Tong and Low Tee Lam had not been lawfully adopted.

The following claimants were before the Court, (and I may say here that it was common ground not only that no further advertisement was necessary but also that the claimants as such, (other than the State of Selangor) were, in fact, genuine claimants that is, were such as they claimed to be from the family point of view). The claimants then were:—

1. The State of Selangor, claiming 'bona vacantia';
2. Low Oon Teen (f);
3. Low Oon Poh (f);
4. Low Oon Kim (f);
5. Low Oon Tee (f);

> These female claimants are all married, the first three being natural daughters of Lim Chee Neo (f), a secondary wife of the deceased Low Boon Tit, and the 5th claimant being a natural daughter of Tan Hee Neo (f) a principal wife of the said deceased.

6. Low Teong Jang;
7. Low Tong Lye;
8. Low Pek Tee;
9. Low Tong Koon;
10. Low Chew Lum;
11. Low Kong Cheng;

> These claimants are all males. The 6th claimant is the adopted son (admitted lawfully) of the deceased's principal wife Tan Hee Neo aforesaid. The 7th and 8th claimants are the natural sons of another principal wife Lee Sang Neo. The 9th claimant is a natural son of the secondary wife Lim Chee Neo aforementioned. The 10th claimant is the lawful son of the (admitted lawfully) adopted son Low Chor Hong of the aforementioned principal wife Tan Hee Neo who died in or about 1928. The 11th claimant is the lawful son of Low Sin Tuan (admitted lawfully) adopted son of the aforesaid principal wife Lee Sang Neo who died in or about 1934.

12. Low Oon Suang (f)

> The married, natural and lawful daughter of the aforementioned Lee Sang Neo (f).

It is accepted generally that the 6th, 7th, 8th, 9th, 10th and 11th claimants stand or fall together in this matter, and there is no question of preference (*vide* paragraph 16 of affidavit of Low Tang Lye affirmed on 28th March, 1938); and it is also accepted generally that the 2nd, 3rd, 4th, 5th and 12th claimants, all being married females, stand or fall together. It may be convenient to state here that, in the event of this finding being in favour of the State of Selangor, the State has promised to hand over the fund to the two 'quasi-adoptees' Low Oon Tong and Low Tee Lam, already referred to, in view of the hardship of their respective cases.

On behalf of the State, two affidavits sworn to by Mr. A. B. Jordan, Secretary for Chinese affairs, Malaya, were filed. On behalf of the male claimants, affidavits sworn to by Mr. N. Grice, Acting Protector of Chinese, Selangor, and Mr. Yap Tai Chee, experienced in Chinese law and custom, were filed, whilst no evidence was forthcoming on behalf of the female claimants. All three deponents were cross-examined before me.

I do not find it necessary to examine in detail the evidence led for the claimants (other than the State of Selangor), for, with all respect to the two gentlemen concerned, their evidence was, in my view, unconvincing and unsatisfactory. Mr. Grice in paragraph 3 (ii) of his affidavit said:—

> "The children of the family of Low Boon Tit deceased (whoever they may be) or some of them are entitled to take the property of Chua Swee Sim Neo deceased."

This was the important sub-paragraph of the affidavit, and in response to Mr. Hay, Mr. Grice admitted in cross-examination that the case reported in 6 F.M.S. Law Reports, page 13, (to which I shall immediately refer) was his authority for his statement, although he went on to say that, even if the judg-

ment did not exist he would still contend that his expert opinion was correct. In view, however, of his admission I feel I cannot attach much weight to the remainder of his evidence, as it would seem that the judgment in question must have to a very large extent coloured his views.

Yap Tai Chee, in his affidavit, agreed with Mr. Grice and said in paragraph 4 that the judgment already referred to had been recognised for many years past to be good law in this country, and correctly expressed the effect of Chinese law and custom as applicable to Chinese residents in Selangor and applied to them by the Courts to this country and followed by themselves. He continued that the principles contained in the judgment had repeatedly and uniformly been applied in Selangor since 1925. Deponent, under cross-examination by Mr. Hay, woefully failed to come up to the above, and I feel I need in the circumstances say no more about it.

The case for such claimants is, therefore, in my view, if I am correct in the attitude I take to the evidence for such claimants, dependent on the decision of my learned predecessor Woodward C. J. in the case of *Yap Ken Keow and anor. v. Low Hup Neo and another,* 6 F.M.S. Law Reports, page 13. On pages 25 and 26 of the judgment, the Chief Justice was dealing with a position very similar indeed to the one under review.

There, he says:—

> "The question then arises who is entitled to take the property undisposed of, not who is entitled to be Chin Thye Lian's successor, for I understand that according to Chinese Law and Custom a woman cannot have a successor. The Perak Order in Council does not help to decide this question....It seems to me that it is useless to search for any Chinese law that would be directly in point."

The learned Chief Justice then goes on to say:—

> "I cannot conceive that any person can be better entitled to Chin Thyè Lian's property than the three children of the family....It seems to me the claim of the State should be recognised as a last resort."

With the utmost respect for this dictum, it appears to me that the Chief Justice, being unable to find any law applicable to the facts before him, took too wide a course when he made the findings he did. I am of opinion that, if there were no law applicable to the case, his duty was to find for the State.

In the circumstances I cannot see that I am in any way fettered by the decision which was based not on any rule of law but on mere surmise. I would add (as I have already pointed out) that, although asserted to the contrary by affidavit, it has never been shown to me that Woodward C. J.'s decision has ever been followed.

Mr. Briggs for the male claimants referred to a case from Jamieson's Chinese Family and Commercial Law', at page 151. This case appears in Appendix II to the work just mentioned which deals with 'Mixed Court Cases'. In view, however, of the preliminary note to the Appendix and to the preliminary words of the report, I feel certain that I should be wrong if I paid any regard to it, even if it were entirely relevant.

Mr. Jordan's opinion is that no one is entitled under Chinese Law and Custom to take in the circumstances obtaining here and, in the absence of any definite evidence or authority to the contrary, I feel bound to agree with him. That being so, the question whether the wife 'cut herself off from her family' by running away with the Chinese doctor need not be discussed.

In the result I am compelled to find that the fund, the subject of the present decision, is *bona vacantia.* In this regard, the question was raised at the hearing, whether in view of the admitted domicile of the deceased, the Government of China should not be heard before an award was made to the State of Selangor. On this point I think the best course would be if Mr. Hay, the Deputy Legal Adviser, would see the appropriate authority and explain the position, if he would kindly do so. The Registrar will supply a copy of this judgment to him for that purpose. If the Government of China wishes to be heard on the matter, a date for argument can be arranged, but if not, in the absence of other claims, the award will be in favour of the State of Selangor.

As regards costs, they must come out of the fund, but it was generally agreed that the amount of such costs should be limited. I accordingly order that a sum not exceeding $2,000 be set aside for the costs of all parties after taxation, and the taxing master will make the necessary adjustments on that basis.

As regards the expenses of the two 'quasi-adoptees', Low Oon Tong and Low Tee Lam, which have been referred to me by the Official Administrator and which were discussed at the argument, if the State of Selangor is successful, the two 'quasi-adoptees' will bear their expenses out of the residue of the fund, which the State is prepared to pay to them, left over after costs have been paid. If, however, the Government of China decided to be represented and were successful, Low Oon Tong will, in any event, receive $200, and Low Tee Lam $400 and a further sum not

exceeding $200 in each case as the Official Administrator may be satisfied is due to them respectively for expenses incurred. In other words, Low Oon Tong will in no case receive more than $400 in all, nor Low Tee Lam more than $600 in all in respect of such expenses.

[APPELLATE CRIMINAL JURISDICTION]
MURRAY-AYNSLEY, J.
July 22, 1938.

SUPRAMANIAM AND 3 OTHERS
v.
PUBLIC PROSECUTOR.

(PERAK MAGISTRATE'S CRIMINAL APPEALS Nos. 34, 35, 36 and 37 of 1938)

Criminal Procedure Code, S. 166—Penal Code, S. 160—Minor Offences Enactment, S. 25—charge of affray joined with charge of disorderly behaviour in public places in the alternative—accused charged with disorderly conduct only after an objection had been raised at hearing—irregularity whether curable.

Where the accused were charged with committing affray under Section 160 of the Penal Code and with disorderly behaviour in public places under Section 25 of the Minor Offences Enactment in the alternative, but, upon an objection being raised at the hearing as to the propriety of the joinder of the charges the magistrate charged the accused with an offence under which they had been charged in the alternative.

Held, that any irregularities that might have occurred in the events that had happened came within and were curable by Section 166 of the Criminal Procedure Code.

MAGISTRATE'S CRIMINAL APPEAL.

B. K. Das for the Appellants.

R. M. Cluer, Deputy Public Prosecutor, for the Respondent.

Murray-Aynsley, J. I can find no merits in these appeals as regards questions of fact and I do not consider the penalties excessive. However, Mr. Das has raised certain questions of procedure which need consideration. When first charged the appellants were charged under Section 160 of Cap. 45 and Section 25 of Cap. 46. Mr. Das during the hearing raised the point that persons could not be charged in the alternative with offences under the Penal Code and with offences under other Enactments. This objection is based on Indian views as to the meaning of the Indian equivalent of Section 166 Criminal Procedure Code. I am unable to follow the reasoning on which such a limitation is based. Confronted with this the Magistrate charged the Appellants with an offence under Cap. 46 viz., section 25 under which they had been already charged in the alternative. There was a verbal error in the new charge. The appellants were given an opportunity of having witnesses recalled for prosecution but did not avail themselves of it. Neither did any of them elect to give evidence.

In my opinion any irregularities that may have occurred are within the scope of Section 422 of the Criminal Procedure Code, and I consider that these appeals should be dismissed.

Appeals dismissed.

[APPELLATE CRIMINAL JURISDICTION]
MURRAY-AYNSLEY, J.
September 12, 1938.

GURUNATHAN CHETTIAR AND ANOTHER
v.
PUBLIC PROSECUTOR.

(PERAK MAGISTRATE'S CRIMINAL APPEALS Nos. 47 and 48 of 1938)

Minor Offences Enactment (Cap. 46), S. 35(i) —theft—insufficient evidence of—charge amended to one of fraudulent possession of property—whether amendment permissible.

Where a prosecution for theft breaks down for lack of or insufficient evidence, it is improper for the Magistrate to amend the charge to one of fraudulent possession of the stolen property under section 35 (i) of the Minor Offences Enactment. To succeed on the latter charge it must be shown that the possession of the article alleged to have been stolen is a suspicious circumstance within the meaning of the section, but possession of an article in common use such as an oil drum is not such a suspicious circumstance where there is no evidence that the article possessed is the one stolen.

If from the circumstances alleged against an accused it is impossible for the person in whose mind suspicions are aroused to say that he suspects that the goods were stolen and not fraudulently obtained or vice versa, a charge under section 35 (i) of the Minor Offences Enactment is not maintainable.

MAGISTRATE'S CRIMINAL APPEALS.

G. Terrell, for the Appellants.

R. M. Cluer, Deputy Public Prosecutor, for the Respondent.

Murray-Aynsley, J. This appeal raises two points—one as to the merits, the other as to a matter of procedure.

As regards the question of merits it is interesting to observe the history of the case. Apparently the Appellants were in the first instance charged with the

S. 35 (i) of the Minor Offences Enactment (Cap. 46) reads:—

"Any person who has in his possession or conveys in any manner anything which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine of fifty dollars, or to imprisonment for three months."